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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Defendant.	No. 08-3124 VRW **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND THE JUDGMENT [FRCP 59(e)]** *Date: May 28, 2009* *Time: 2:30 p.m.* *Place: Courtroom 6, 17th Floor*

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on May 28, 2009 at 2:30 p.m. in the Courtroom of the Honorable Vaughn R. Walker, United States District Judge, Courtroom 6, 17th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California, plaintiff United States of America, represented by the United States Attorney for the Northern District of California, through Jonathan U. Lee, Assistant United States Attorney, will and hereby does move the Court under Federal Rule of Civil Procedure 59(e) for an order altering or amending the March 23, 2009 judgment in this case. The Court should grant the motion because the Ninth Circuit does not recognize state administrative proceedings as preclusive when the state adjudicator lacked jurisdiction to decide the federal claim. Here, the state adjudicator was the California Workers Compensation Board, which did not have the jurisdictional power to decide the federal preemption claim, under California law. Moreover, the WCAB was compelled by controlling California Supreme Court authority to follow and apply California law, even against a constitutional challenge such as the federal preemption claim pressed by the VA. The motion will be based on this notice, the memorandum of points and authorities, the declaration of Jonathan U. Lee with the evidence submitted therewith and such other matters as may be considered by the Court.

Respectfully submitted,

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United States Attorney

Date: April 3, 2009

/s/
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

By order dated March 20, 2009, the Court granted CIGA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the grounds of claim preclusion. The Court entered judgment on March 23, 2009.

___The United States moves under Federal Rule of Civil Procedure 59(e) for an order altering or amending the judgment "to correct a manifest error of law or fact upon which the judgment is based" because the WCAB did not have jurisdiction to entertain the government's claim that federal law preempted California's workers compensation statutes. Under California law, the WCAB had to enforce California law. *Greener v. WCAB*, 6 Cal.4th 1028 (1993). Because the WCAB lacked jurisdiction to do anything other than follow California law, it was a "tribunal of limited jurisdiction," and the state administrative proceedings should have no preclusive effect on the federal preemption claim. *Shaw v. Calif. Dept. Of Alcoholic Beverage Control*, 788 F.2d 600 (9th Cir. 1986).

FACTUAL BACKGROUND

A. The Administrative Proceedings

Before the state administrative law judge and later the Workers Compensation Appeals Board, the VA presented its lien for reimbursement, based on the contention that the federal statute, 38 U.S.C. section 1729, preempted conflicting California's workers compensation statutes. *See* Guilford Declaration (Dkt. 11), Exhs. 4 at pp. 29-30, 7 at pp. 46-47, 10 at p. 58, and 12 at pp. 88-93, 96-100.[1]

- On page 29-30 of Exhibit 4, the VA's Petition for Reconsideration dated October 6, 2006, the VA argued that federal law preempted any conflicting state workers compensation law, citing specifically Insurance Code section 1063.1(c)(4), which bars CIGA from paying any federal claim for reimbursement.

[1] Page number references are as provided in the lower right hand corner of each page of the Guilford Declaration.

- In Exhibit 7, which was the VA's November 29, 2006 response to CIGA's Answer to the Petition for Reconsideration, at pages 46-47, the VA countered CIGA's anti-preemption argument based on the McCarran-Ferguson doctrine.
- In its Supplemental Points and Authorities dated January 3, 2007, which was Exhibit 10, at page 1, the VA reincorporated its preemption arguments by reference.
- Finally, in Exhibit 12, the VA's Petition for Reconsideration before the WCAB, dated February 23, 2007, the VA argued its preemption claims on pages 88-93 and 96-100.

The workers compensation administrative law judge declined to decide the VA's preemption claim. Guilford Decl., Exh. 11, p. 85. The WCAB denied reconsideration of this order. *Id.*, Exh. 15 at p. 126. In its order denying reconsideration, the WCAB refused to decide the VA's constitutional claims. *Id.* at 122, fn. 2.

B. The Motion To Dismiss

In its motion to dismiss, CIGA argued that the WCAB had "exclusive jurisdiction" over workers compensation claims and lien claims by medical providers under California law. Motion at 5. CIGA further contended that because the VA did not seek relief from the WCAB result by way of a writ of review to the California court of appeal, the WCAB decision was res judicata to this action, which presented the same arguments and issues raised before the WCAB. *Id.* at 5-7.

In its opposition, the United States argued that Congress created in the federal statute a right of review in federal district court when a state law discriminated against the federal government's reimbursement claims for treating veterans for non-service related injuries. Opposition at 9-13. The United States argued that state workers compensation statutes could not restrict or define the federal government's right to reimbursement, because of the pre-emptive effect Congress created in the federal statute, but the United States' opposition did not cite or discuss *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) or the exception to *Utah Construction* recognized by the Ninth Circuit briefed in this motion.

C. The March 20, 2009 Order

In its order granting CIGA's motion to dismiss, the Court based its decision on the *Rooker-Feldman* doctrine, which holds that federal courts should not serve as "appellate tribunals" for the alleged errors of a state court final judgment. The Court relied upon the decision of the California state agency charged with deciding workers compensation claims issues, the Workers Compensation Appeals Board, as the final state administrative order deserving of preclusive effect. As the Court noted in its order, the Ninth Circuit recognizes claim preclusion and issue preclusion from state administrative proceedings, provided the requirements of fairness set out in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) are met. *See Miller v. Santa Cruz*, 39 F3d 1030 (9th Cir. 1994). These requirements are that: (1) the administrative agency act in a judicial capacity, (2) the agency resolve disputed issues of fact properly before it and (3) the parties have an adequate opportunity to litigate. *Id.* at 422.

The Order identified several reasons why the WCAB's proceedings should be given preclusive effect to bar our complaint under *Rooker-Feldman*. First, under California law, the WCAB is considered a "court" with exclusive jurisdiction over workers compensation matters, including medical liens such as that presented by the VA. Order at 5. Second, according to the Order, the WCAB resolved the legal issues "properly before it" with an order dated April 23, 2007. Third, the VA raised the same arguments before the WCAB that it seeks to press through the federal complaint. Fourth, under California law, the VA had a right to seek appellate review by writ of review to the California Court of Appeal. Order at 5-6.

The Court entered judgment for CIGA on March 23, 2009.

ARGUMENT

I. APPLICABLE LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) permits a motion to alter or amend a judgment to be filed within ten days following entry of judgment. There are four grounds upon which a Rule 59(e) motion may be granted: 1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; 2) the moving party presents newly discovered or previously unavailable evidence; 3) the motion is necessary to prevent manifest injustice; or 4) there is an intervening change in controlling law. *Turner v. Burlington Northern Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (citations and quotations omitted).

II. BECAUSE THE WCAB LACKED JURISDICTION OVER THE FEDERAL CLAIM, IT WAS AN ERROR OF LAW TO GIVE THE WCAB'S ORDER PRECLUSIVE EFFECT.

The Ninth Circuit recognizes claim preclusion and issue preclusion from state administrative proceedings if: (1) the administrative agency act in a judicial capacity, (2) the agency resolve disputed issues of fact properly before it and (3) the parties have an adequate opportunity to litigate. *See Miller v. Santa Cruz*, 39 F3d 1030 (9th Cir. 1994). There is an exception to this rule when the "adjudicator lacks jurisdiction to determine an issue." *Miller*, 39 F.3d at 1038. When the adjudicator is a "tribunal of limited jurisdiction" under state law, the Ninth Circuit does not give claim or issue preclusive effect to the adjudicator's decision. *Shaw v. Calif. Dept. Of Alcoholic Beverage Control*, 788 F.2d 600, 608-609 (9th Cir. 1986).

A. Whether a State Administrative Agency Finding Has Preclusive Effect Is a Question of State Law.

The preclusive effect of an administrative agency's determination is decided by California law. As the Order noted, federal courts may not "employ their own rules ... in determining the effect of state judgments," but must "accept the rules chosen by the State from which the judgment is taken." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481–82 (1982); *see also Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 (1985).

B. Under California law, the Workers Compensation Appeals Board Does Not Have The Power To Rule In Favor of the VA's Preemption Claim.

The WCAB lacked the jurisdiction to grant the VA's petition. *Greener v. WCAB*, 6 Cal.4th 1028 (1993).

In *Greener*, the issue presented was whether plaintiffs could bring constitutional challenges to state workers compensation laws in superior court. After finding that the plaintiffs had to bring their claims before the WCAB, not in superior court, the California Supreme Court held that until a court of appeal has "considered and upheld" a constitutional challenge to the workers compensation laws, the WCAB "must comply with the statutes." *Greener*, 6 Cal.4th at 1038. The Court discussed the WCAB's jurisdiction at length and concluded it did not have jurisdiction to decide constitutional challenges. "The [WCAB's] jurisdiction thus conferred extends to claims for industrial injury and proceedings related to the enforcement of rights under the workers' compensation law. None of the matters identified in [Labor Code] section 5300 encompasses a claim that a legislative amendment to that law is unconstitutional." *Id.* 1039.

Adhering to this jurisdictional limitation, the administrative law judge declined to decide the preemption issue in his January 31, 2007 Amended Opinion on Decision:

> This Court will not decide the issue as to whether federal law preempts state law (McCarran Ferguson Act issue) nor whether CIGA is a "third party" pursuant to 38 U.S.C. 1729(i)(3). Neither party has pointed to case law directly on point on these issues. Pursuant to Greener v. WCAB (1993) 58 CCC 793, this Court is required to follow California law.

Guilford Decl., Exh. 11, p. 85. Thereafter, on February 1, 2007, ALJ Johnston issued an Amended Joint Findings which disallowed the lien without discussion: "The lien of the Veterans Administration is disallowed." *Id.* at p. 69.

Similarly, the WCAB's April 23, 2007 Order Denying Reconsideration acknowledged its limited power to resolve the issues presented by the VA's claims. In footnote 2, citing the California Constitution and *Greener*, the WCAB affirmed that it "does not determine the constitutionality of statutes and that contention will not be addressed herein." Guilford Decl., Exh. 15, p 122. The WCAB denied reconsideration for two reasons. First, it denied reconsideration because Insurance Code section 1063.1(c)(4) "excludes obligations to the federal government from the statutorily-defined 'covered claims' for which CIGA is liable." *Id.* at p. 122, 125. Second, it determined, interpreting the federal statute by reliance on California statutes and case law, that CIGA was not an "insurance carrier" or the "state or political subdivision of a State" but rather an involuntary association of insurers created by the state of California. *Id.* at 123-24.

The VA's claim of preemption was a constitutional challenge because preemption of state law is rooted in the Constitution's Supremacy Clause. *See, e.g.*, *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-713 (1985) ("It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." *citing Gibbons v. Ogden,* 9 Wheat. 1, 211, 6

L.Ed. 23 (1824) (Marshall, C.J.)). Preemption takes different forms, including express preemption by Congress, field preemption or conflict preemption. Congress is "empowered to preempt state law by so stating in express terms." *Hillsborough County*, 471 U.S. at 713. In the absence of express preemption, Congressional intent to preempt "may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Id.* Finally, conflict preemption arises when "'compliance with both federal and state regulations is a physical impossibility,' [citations omitted], or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [citation]." *Id.*

Here, federal law and California's federal exclusion are incompatible. The federal statute expressly preempts California's conflicting laws, as set forth in the United States' Opposition; in the alternative, there is conflict preemption because compliance with both federal and state laws is an "impossibility." This is so because CIGA cannot both enforce the federal exclusion in Insurance Code section 1063.1(c)(4) and pay a VA lien under 38 U.S.C. § 1729.

To find in favor of the VA, the WCAB would have necessarily had to conclude that the federal statute preempted California's federal exclusion at Insurance Code section 1063.1(c)(4). The WCAB lacked the power under California law to do anything other than follow and enforce California's federal exclusion. *Greener v. WCAB*, 6 Cal.4th at 1038.

C. The Final WCAB Order Has No Preclusive Effect on Plaintiff's Preemption Claim.

Because the WCAB lacked jurisdiction over the VA's claim of federal preemption, the WCAB's final order does not have preclusive effect. *Shaw v. Calif. Dept. Of Alcoholic Beverage Control*, 788 F.2d 600 (9th Cir. 1986). In *Shaw*, California initiated an administrative proceeding before the Department of Alcoholic Beverage Control (ABC) to revoke plaintiff's liquor license. Shaw's defense was to claim that local police engaged in racially discriminatory misconduct when they gathered evidence used in the revocation proceeding. Shaw lost before the ABC and the ABC's appeals board. Shaw then took a writ of review to the court of appeal and lost. Shaw then took a writ to the Supreme Court, which he also lost. Shaw filed a section 1983 claim in federal court, naming the director of the ABC and local police officials in his civil rights claims. The district court granted the motion to dismiss based no claim preclusion as to the ABC director and issue preclusion as to the police defendants. The Ninth Circuit reversed the latter of these holdings.

Citing comity principles, the Ninth Circuit acknowledged it could give state proceedings “no greater preclusive effect” than state courts would. *Id.* at 607. Reviewing California law, the Ninth Circuit explained the exception to claim or issue preclusion for “tribunals of limited jurisdiction:”

> The California courts have long held that if a court did not have the jurisdiction to decide an issue directly, neither claim nor issue preclusive effect will be given to an incidental determination of that issue by the court, even though the court did have jurisdiction to make the incidental determination. *Id.*

To decide whether the first judgment should have preclusive effect, the court looks to the jurisdiction of the tribunal conducting the hearing or trial that decided the issue, not that of any appellate court that reviewed the decision:

> In considering whether there was jurisdiction to determine an issue directly the first time it was decided, a court looks to the jurisdiction of the court that conducted the hearing or trial in which the issue was resolved and not to the jurisdiction of the appellate court that reviewed the lower court's decision.

Id. Because the ABC’s jurisdiction was limited by California law to deciding license revocation and did not extend to claims of police misconduct, the Ninth Circuit held that the ABC’s determination on the police misconduct issue did not have preclusive effect against the Shaws’ subsequent federal action for civil rights violations. *Id.* at 608.

Shaw is controlling Ninth Circuit authority on the issue decided in the March 20, 2009 Order. Because the WCAB was a “tribunal of limited jurisdiction,” as the California Supreme Court decided in *Greener,* it could not grant the relief sought by the VA. Therefore, because jurisdiction was lacking, the legal issues raised by the VA were not “properly before” the WCAB.

Finally, neither the failure to take a writ of review nor the unsuccessful taking of such a writ changes the analysis. The Ninth Circuit said in *Shaw* that when the original tribunal lacks jurisdiction over the claim alleged in the second action, the state judgment has no preclusive effect. This is true even if a litigant seeks, as the Shaws did, relief in a California court of appeal by writ of review.

> Our conclusion in not changed by the fact that the Court of Appeal affirmed the decision of the ABC, because, as noted above, we look to the proceedings in the initial forum, not the appellate forum.

Id. at 609. Here, the initial forum was the WCAB, which was powerless to find in favor of the VA.

III. BECAUSE THE WCAB DID NOT DECIDE THE FEDERAL PREEMPTION CLAIM, THE *UTAH CONSTRUCTION* DOCTRINE SHOULD NOT APPLY.

This motion should be granted for the separate reason that the WCAB did not decide the federal government's claim that federal law preempts state law. As noted above, under *Utah Construction*, there may be preclusive effect given to a state agency determination, if basic requirements of fairness are met. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). One of those requirements is that the state agency decide the issues raised before it.

As a preliminary matter, under California law, it appears that the administrative law judge's declination to decide the federal issue is the order of the WCAB, because the WCAB did not grant reconsideration. *See* Cal. Code Regs., tit. 8, § 10348 ("...Orders, findings, decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted."). In any case, neither the administrative law judge nor that WCAB had the jurisdiction to decide the federal preemption claim and neither in fact purported to decide that claim.

In its order denying reconsideration, the WCAB said it does not and therefore would not decide whether workers compensation statutes are constitutional. Guilford Decl., Exh. 15, p. 122. The WCAB, even if it took up this disputed legal issue – which it expressly refused to do, did not have any power to enforce federal law over conflicting provisions of California law. *Greener v. WCAB*, 6 Cal.4th 1028, 1038-39 (1993). Furthermore, in its order, the WCAB limited itself to California case law and statutes when it discussed whether CIGA was a "third party" under the federal statute. Guilford Decl., Exh. 15, pp. 123-125. The WCAB's discussion of this statutory issue, in addition to being beyond the WCAB's jurisdictional reach, was inconsistent with the federal statute's express preemptive intent to eradicate state law barriers to federal recoveries:

> (f) No law of any State or of any political subdivision of a State, and no provision of any contract or other agreement, shall operate to prevent recovery or collection by the United States under this section ...

Because the WCAB did not decide it, the state administrative proceedings should not preclude the United States' preemption claim.

CONCLUSION

The motion should be granted and the judgment should be vacated.

Respectfully submitted,

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Date: April 3, 2009

/s/
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